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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 597.

BORDEN'S FARM PRODUCTS COMPANY, INC.,
Appellant,

against

PETER G. TEN EYCK, as Commissioner of Agriculture and Markets of the State of New York, *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR APPELLANT.

WALTER E. HOPE,
Counsel for Appellant.

TIMOTHY N. PFEIFFER,
EDGAR P. BAKER,
of Counsel.

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The Classified Price Plan Before and After the Milk Control Law.

Repeated statements are made in the respondents' brief that the "independent" dealers paid as much or more for their milk as did the advertised dealers prior to the enactment of the Milk Control Law and that the Law imposed upon the "independents" the unfair necessity of paying "for almost *all* of their purchases at a price which the large, well-advertised dealers paid for only a *part* * * *" (pp. 15, 18, 19, 22, 36). The fact is, of course, that before the Milk Control Law the "independents" paid less for the

same grade of milk sold for the same use than did the advertised dealers, and the Law was primarily designed to equalize prices paid to the producers for milk according to its use. The essence of the classified price plan is the relation between price and use, and to speak of prices paid for milk without reference to utilization results in a distorted picture.

The respondents urge that the differential should be sustained because it discriminates in favor of the "independent" producers and against the organized producers by enabling the "independent" dealers to sell a greater percentage of their milk for fluid consumption (p. 43). We had thought this to be an argument *against* the constitutionality of the differential, but apparently the respondents believe that the "independent" producers are entitled to preferred treatment at the hands of the Legislature. As we have pointed out in our main brief (pp. 10-12, 15-16) the willingness of the "independent" producers to sell milk for fluid consumption at reduced prices had the inevitable result of lowering the prices paid to *all* producers, and the Pitcher Committee found that the only permanent solution of the problem of inadequate prices to the producers lay in cooperative action and the universal application of the classified price plan (Pitcher Report, p. 17). The granting of a special privilege to the "independent" producers at the expense of the members of the cooperative associations is not only unfair in itself, but directly opposed to the conclusions and recommendations of the Legislature's investigating Committee.

The Loss to the Appellant.

The respondents question the extent of the loss to the appellant.

In the first week after the ban on the sale of bulk milk, appellant's sales decreased 21,054 quarts per day, and in the ensuing seventeen months the appellant's store sales

decreased by an additional 42,000 quarts per day (R. 297, Findings 62, 63). This decrease in appellant's store business was far in excess of the decrease in general consumption during the same periods (R. 296, Finding 61).

In the period between November, 1932 and November, 1934, the decrease in consumption in the Metropolitan market was approximately 4.6% (R. 293, Finding 51); the decrease in appellant's store business (including relief milk in November, 1934) was about 16.3% (R. 295, Finding 58). The difference between these figures, which is not attributable to the decrease in consumption, amounts in quarts to an average loss of 34,501 quarts per day, or over 230,000 quarts per week. This is a sizable milk business in itself, larger than most of the "independents".

The decrease in the appellant's store business was likewise in excess of the decrease (if there was any) in the store business in New York City, for there has been a continuing trend from retail sales of bottled milk to sales of bottled milk through stores (R. 285, Finding 17) and the advertised dealers have had a smaller proportion of the store business in bottled milk than have the "independent" dealers since the enactment of the 1933 Law (R. 287, Finding 23).

From these findings the Special Master concluded that "By reason of said differential provision, the plaintiff is now suffering, and will continue to suffer, irreparable damage." (R. 299.)

There are no corresponding figures in the record covering the experience of the "independents". The appellant furnished complete data concerning its business. Presumably all available data concerning the business of other dealers was in the possession of the respondents, and it is fair to assume that if it tended to controvert the estimates submitted by the appellant and accepted by the Special Master, it would have been introduced in evidence.

The Differential Is Not Aimed at Monopoly.

The respondents have much to say upon the subject of monopoly and an effort is continually made to create an atmosphere of an octopus crushing out the weak. The Court below found that "At no time in recent years has any one company had a monopoly or even a near monopoly of the business of the distribution of milk in New York City." (R. 287, Finding 21.) The appellant, in November, 1934, had only 15% of the business to which the differential relates; Sheffield Farms Company only 17%; M. H. Renken Dairy Company 2½%, and Dairymen's League ½% (R. 287, Finding 22). It is perhaps unfortunate that the plaintiff here is one of the large companies. If the plaintiff were one of the smaller advertised companies with only a fraction of the business, the issue would then be greatly clarified and the irrelevance of the arguments now made by the respondents as to monopoly, chain stores, etc. would be more readily apparent.

The Appellant Is Not Estopped from Bringing This Action.

It has not seemed necessary to give extended attention to the claim of estoppel raised for the first time by amended answer after reference to the Special Master. It was disposed of by the Special Master by reasoning which seems conclusive (R. 305), and the Court below declined to consider it. The application for a license under a statute which by its terms was to continue for only one year cannot be said to waive rights under a statute subsequently enacted for the succeeding year.

Respectfully submitted,

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TIMOTHY N. PFEIFFER,
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